

04-27594

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Chapter 13 Case:

Case Number BKY 04-50348-RJK

Barbara Johnson
Gary Johnson,

Debtor(s)

**NOTICE OF HEARING AND MOTION
FOR RELIEF FROM STAY**

To: The Debtor and other entities specified in Local Rule 9013-3(a).

1. Ameriquest Mortgage Company moves the Court for relief requested below and gives Notice of Hearing.

2. The Court will hold a Hearing on this motion at 10:30 a.m., on November 29, 2004, in Courtroom No. 2, at the United States Courthouse, at 515 West First Street, in Duluth Minnesota.

3. Any response to this motion must be filed and delivered not later than November 23, 2004, which is three days before the time set for the hearing(excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than November 17, 2004, which is seven days before the time set for the hearing(excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 13 case was filed on March 26, 2004. The case is now pending in this court.

5. This Motion arises under 11 U.S.C. §362 and Bankruptcy Rule 4001. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9013-1 - 9019-1(d). Movant Requests Relief with respect to exempt property of the debtor subject to a lien.

6. On September 7, 2002, Gary W. Johnson made, executed and delivered to Ameriquest Mortgage Company his Note (hereinafter referred to as the "Note"), in the original principal amount of \$90,000.00 bearing interest from the date thereof at the rate of 10.500% per annum until paid, payable in monthly installments of \$823.27 commencing on November 1, 2002 and on the first day of each and every calendar month thereafter until the principal and interest were fully paid. A copy of the Note is attached hereto as

Exhibit "A" and made a part thereof by reference.

7. On September 7, 2002, to secure the payment of the Note, Gary W. Johnson executed and delivered to Ameriquest Mortgage Company his Mortgage (hereinafter referred to as the "Mortgage"), mortgaging and conveying certain real estate in Benton County, Minnesota, legally described as follows:

Lot Seventeen (17), Block Three (3), of Auditor's Subdivision, Village of Gilman, Plat 1, Benton County, Minnesota Also an Easement for Sewer purposes over and across the East Ten Feet (10) of Lot One (1), Block Three (3) of said Auditor's Subdivision, Village of Gilman, Plat 1.

which property has an address of: 10349 115th Street North, Gilman, MN 56333. The mortgage was filed for record in the office of the Recorder, County of Benton, on November 14, 2002, as Document No.291784, and was subsequently assigned to Movant by assignment of mortgage. A copy of the mortgage is attached hereto as Exhibit "B" and made a part hereof by reference.

8. The debtors have filed a plan dated March 26, 2004, which was confirmed by subsequent Court Order. The plan provided, among other things that:

"5. Home Mortgages In Default [§1322(b)(5)] - The trustee will cure defaults on claims secured only by a security interest in real property that is the debtor's principal residence as follows. The debtor will maintain the regular payments which come due after that date the petition was filed. The creditors will retain their liens. The amounts of default are estimates only. The trustee will pay the actual amounts of default.

9. Notwithstanding the foregoing provisions of said plan, the debtors have not maintained current payments with respect to said note and mortgage, while this case is pending.

10. Debtors are in arrearage for monthly payments as shown below. The last payment received from Debtors was applied to the July, 2004 post-petition payment as that was the next payment due. Post-petition arrearage include the following:

3 payments @ \$896.18	\$2,688.54
3 late charges @ \$46.16	138.48
Suspense Balance	-807.67
Attorneys Fees & Costs	<u>700.00</u>
TOTAL POST-PETITION	\$2,719.35

Through Debtors' failure to make current post-petition payments, amounts currently due and owing include the following:

Principal	\$89,347.42
Interest	5,541.64
Escrow Shortage	728.06
Accumulated late fees	658.56
Non escrow advances	1,600.00
Attorneys Fees & Costs	<u>1,400.00</u>
TOTAL	\$99,275.68

1. The Debtor's interest in the real and personal property, as to the payment of which the Debtor is liable, is hereby exempted.

2. Because an overriding equitable good cause exists to lift the automatic stay, the Court grants the Debtor's motion pursuant to section 362 of the Bankruptcy Laws of the United States.

3. This is an attempt to collect a debt and any information obtained will be used for that purpose. This notice is required by the provisions of the Fair Debt Collection Practices Act and does not imply that we are attempting to collect money from anyone who has discharged the debt under the Bankruptcy Laws of the United States.

Wherefore, Ameriquest Mortgage Company moves the court:

1. For an order granting relief from the automatic stay of the Debtor's motion.

2. For such other and further relief as the Court finds just and proper.

Dated: 10/8/04

Signed: /s/ Nancy A. Nordmeyer

SHAPIRO & NORDMEYER, L.L.P.
Nancy A. Nordmeyer-121356
Lawrence P. Zielke-152559
Attorney for Movant
7300 Metro Boulevard #390
Edina, MN 55439-2306
(952) 831-4060

VERIFICATION

I, Adrienne Perera, the bankruptcy counselor of Ameriquest Mortgage Company, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: October 8, 2004

Signed: Adrienne Perera

AMERIQUEST MORTGAGE COMPANY
505 City Parkway West
Suite 110
Orange, CA 92868

No. 0038377040 - 7339

FIXED RATE NOTE**THIS LOAN HAS A PREPAYMENT PENALTY PROVISION.**September 7, 2002
(Date)Orange
(City)CA
(State)10349 115TH Street Northeast, GILMAN, MN 56333
(Property Address)**1. BORROWER'S PROMISE TO PAY**

In return for a loan that I have received, I promise to pay U.S. \$90,000.00 (this amount is called "principal"), plus interest, to the order of the Lender. The Lender is Ameriquest Mortgage Company.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. I will pay interest at a yearly rate of 10.500%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS**(A) Time and Place of Payments**

I will pay principal and interest by making payments every month.

I will make my monthly payments on the first day of each month beginning on November 1, 2002.

I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on October 1, 2032, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at: 505 City Parkway West, Suite 100 Orange, CA 92668
or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payments will be in the amount of U.S. \$823.27.

4. BORROWER'S RIGHT TO PREPAY

I may repay this Note in part or in full at any time. If I prepay this loan in full within the first 36 months from the date of this Note, I agree to pay the Note Holder a prepayment penalty of the lesser of two percent (2%) of the unpaid principal balance or sixty (60) days interest on the unpaid principal balance.

5. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charges shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from me which exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the principal I owe under this Note or by making a direct payment to me. If a refund reduces principal, the reduction will be treated as a partial prepayment.

6. BORROWER'S FAILURE TO PAY AS REQUIRED**(A) Late Charges for Overdue Payments**


If the Note Holder has not received the full amount of any monthly payment by the end of fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.


(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed me.

WE HEREBY CERTIFY THIS
TO BE A TRUE AND CORRECT
COPY OF THE ORIGINAL
BY: 
AMERIQUEST MORTGAGE COMPANY

Initials: 

09/07/2002 09:03:03 AM

Registration tax hereon of \$ 267⁰⁰ paid
Aud./Treas. Receipt No. 47510

Don Nemer
County Aud./Treas. don

MARILYN J. NOVAK
COUNTY RECORDER

BY CK DEPUTY xm

OFFICE OF
BENTON COUNTY RECORDER
BENTON COUNTY, MN
CERTIFIED TO BE FILED
AND/OR RECORDED ON

291784

2002 NOV 14 P 1:48

[Space Above This Line For Recording Data]

MORTGAGE

Return To:

Ameriquist Mortgage Company
P.O. Box 11507
Santa Ana, CA 92711

802²⁸

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated September 7, 2002 together with all Riders to this document.

0038377040 - 7339

MINNESOTA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3024 1/01

 -6(MN) (0006)

Page 1 of 15

In/Under Buy

VMP MORTGAGE FORMS - (800)521-7291

09/07/2002 9:05:03

21⁰⁰ NW 1/4
Ckt 826 12

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case No. 04-50348 RJK
Chapter 13

Barbara Johnson
Gary Johnson,

Debtor(s)

MEMORANDUM OF LAW

Ameriquist Mortgage Company ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Movant holds a valid, duly perfected mortgage on real property owned by the Debtors. On the date this case was filed, the Debtor(s) were delinquent in respect of payments due under the note and mortgage. Since this case was filed, Debtor(s) are in arrears in the total amount of \$2,719.35.

ARGUMENT

1. Under Section 362.(d)(1) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such creditor." 11 U.S.C. Sec. 362 (d) (1). The Debtor(s) in this case have failed to make the payments required by the note and mortgage for a period of more than two months. Debtor(s) have not otherwise provided Movant with adequate protection of its interest in the property. Such circumstances constitute cause, within the meaning of Section 362 (d) (1), justifying relief from the stay. In Re Video East, Inc., 41 B. R. 176 (Bkrtcy. E. D. Pa. 1984); In Re Frascatore, 33 B. R. 687 (Bkrtcy. E. D. Pa. 1983).

2. Pursuant to Section 362 (d) (2) of the Bankruptcy Code, relief from the stay is also appropriate where Debtor(s) have no equity in the subject property and the property is not necessary to an effective reorganization. 11 U.S.C. Sec. 362 (d) (2). See, In Re Gellert, 55B.R. 970 (Bkrtcy. D. N. H. 1983). In the present case the balance due Movant on the note and mortgage is \$99,275.68.

Accordingly, Movant is entitled to an order terminating the stay and authorizing it to foreclose its mortgage on the property.

Dated: _____

10.13.01

Respectfully submitted,
SHAPIRO & NORDMEYER, L.L.P.

By: /s/ Nancy A. Nordmeyer
Nancy A. Nordmeyer-121356
Lawrence P. Zielke-152559
Attorney for Movant
7300 Metro Boulevard #390
Edina, MN 55439-2306
(952) 831-1060

SWORN CERTIFICATE OF SERVICE

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

I, **Stephanie Pilegaard** says that on October 13, 2004, I mailed copies of the annexed Memorandum of Law, Proposed Order for Relief from Stay, Notice of Hearing and Motion for Relief from Stay and Certificate of Service on the following interested parties at their last known address, by mailing to them, via first class mail, a copy thereof, enclosed in an envelope, postage prepaid and by depositing the same in the post office at Edina, Minnesota.

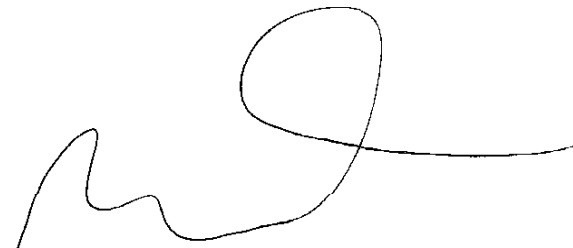
Barbara Johnson
PO Box 68
Gilman, MN 56333

Gary Johnson
PO Box 68
Gilman, MN 56333

Wesley Scott, Esq.
13 S. 7th Ave
St. Cloud, MN 56301

Michael Farrell, Trustee
PO Box 519
Barnesville, MN 56514

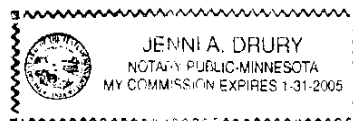
U.S. Trustee
1015 U.S. Courthouse
300 South 4th St.
Minneapolis, MN 55415



Stephanie Pilegaard

Subscribed and sworn to before me October 13, 2004.

Notary



04-27594
0038377040

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Case Number BKY 04-50348-RJK

Barbara Johnson
Gary Johnson,
Debtor(s)

ORDER FOR RELIEF FROM STAY

The above-entitled matter came for hearing on November 29, 2004.

THIS CAUSE coming to be heard on the Motion of Ameriquest Mortgage Company, a creditor in the proceeding, the Court having jurisdiction, due notice having been given, and the Court having been advised in the premises;

IT IS HEREBY ORDERED,

That the automatic stay heretofore entered in this case is modified to the extent necessary to allow Ameriquest Mortgage Company, its successors and/or assigns, to foreclose, in accordance with State Law, the mortgage on the real property commonly known as:

Lot Seventeen (17), Block Three (3), of Auditor's Subdivision, Village of Gilman, Plat 1, Benton County, Minnesota Also an Easement for Sewer purposes over and across the East Ten Feet (10) of Lot One (1), Block Three (3) of said Auditor's Subdivision, Village of Gilman, Plat 1.

NOTWITHSTANDING Federal Rule of Bankruptcy Procedure 4001 (a)(3), this order is effective immediately.

Dated: _____

BY THE COURT:

Judge of Bankruptcy Court